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Supreme Court of the United States

No. 475. October Term, 1939.

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,
Petitioner,

against

BERWIND-WHITE COAL MINING COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

REPLY BRIEF FOR PETITIONER.

January 2, 1940.

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REPLY BRIEF FOR PETITIONER.

POINT I.

Respondent's brief has narrowed the issue to a single question: Does the tax at bar subject interstate commerce to a burden, or to the danger of a burden, of multiple taxation not borne by local commerce?

The issues in this case have been very effectively, and we think satisfactorily, narrowed by the respondent's brief. As we read it, respondent is in entire agreement with the fundamental proposition presented in our principal brief, that the only question to be determined in this case is whether or not as a matter of fact the tax at bar subjects interstate commerce to a burden, or to the danger of a burden, of cumulative taxation not borne by local commerce.

In developing this proposition, the respondent propounds a number of legal theories with which we are

not in entire accord. For example, we do not agree with respondent's elaborate attempt to build up the theory that a sale of goods across State lines is an "integrated transaction" which cannot in any way be subdivided into its component parts; nor do we agree with the argument that respondent itself is a taxpayer, as distinguished from a tax collector.[1] Nor are we in entire agreement with respondent's development of the proposition that the transactions in question are "within the protection of the Commerce Clause", or that the burden of the tax is "direct" rather than "indirect".

But it seems to us that an extended discussion of these theories will not contribute to a solution of the true problem which all parties agree is presented by this litigation: Does the tax in question violate the Commerce Clause by exposing interstate commerce to the danger of a burden of multiple taxation not borne by local commerce? As we see it, it makes no difference, in resolving that question, whether we label the transaction as "integrated" or "separable", or say that the tax burden is "direct" or "indirect", or that the transactions are or

[1] Although respondent admits at page 16 of its brief that "the tax is imposed upon the buyer", nevertheless it seeks to argue, on the basis of the decision of the State Court of Appeals in *Matter of Atlas Television Co.*, 273 N. Y. 51 (1936), that as a matter of fact the obligation of the seller to collect the tax is the obligation of a taxpayer. As we pointed out in our principal brief (page 49) the Court of Appeals in *Matter of Merchants Refrigerating Co. v. Taylor*, 275 N. Y. 113 (1937), specifically rejected the claim of a seller that it was subject to double taxation because in addition to a gross receipts tax imposed upon it, it had to collect a sales tax from the purchasers of its product. In rejecting this contention the Court after pointing out that "the sales tax falls on the purchaser" said (at p. 124): "The *Atlas Television* case (273 N. Y. 51) did not hold that the sales tax is imposed on the vendor, but only that he is under a duty to pay the tax to the city, regardless of whether or not the vendor collects it from the purchaser." See also *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U. S. 62 (1939).

are not "transactions in interstate commerce." The particular words or phrases used in describing the transactions cannot change the course of interstate commerce.

Let us turn immediately, therefore, to a discussion of the question of whether or not the tax at bar subjects interstate commerce to a burden of multiple taxation not borne by local commerce.

POINT II.

It is because the tax at bar is imposed upon a local purchaser and upon a local transfer of title and possession that it is not a tax of such a nature that, if valid, it could be imposed with equal right in any other State which the commerce touches and thus subject interstate commerce to a danger of multiple taxation not borne by local commerce.

It is our contention that the rule of multiple taxation can be invoked to invalidate a tax only if it is of such a nature that if it were sustained, it would follow that an identical tax could be imposed upon the same phase of the same transaction in any other State where the same taxable activity took place. It is only under such circumstances that a particular taxing statute could subject interstate commerce to cumulative taxation by different States to which local transactions would not be subjected. And so this Court has invariably held. For example, in *Case of the State Freight Tax* (15 Wall. 232 [1872]), if the Court had sustained the imposition by the State of Pennsylvania of a tax of so much per ton upon all freight transported within the State, it would have been obliged to sustain an identical tax imposed upon the identical freight by every other State through which the freight was carried. Thus, goods from other States would be subjected to multiple taxation not

borne by goods shipped merely from one point within the State to another. So, also, a tax upon the gross receipts of one engaged in selling goods in interstate commerce could be imposed by every State in which any part of the activity was carried on. Hence the doctrine of *Adams Mfg. Co.* v. *Storen* (304 U. S. 307 [1938]), and *Gwin, White & Prince, Inc.* v. *Henneford* (305 U. S. 434 [1939]), that, unless such a tax is apportioned to the business done in each State, it is invalid.

In each of these situations, the tax was imposed upon an ambulatory phase of the transaction, which could not in any way be localized in a single State. That is why, if valid in the one State, the identical tax upon the identical taxpayer could be imposed in any State where the activity happened to take place. And that is why multiple burdens would result if the unapportioned tax were sustained in any State. A local seller would pay a gross receipts tax only in his own State, but an interstate seller might be subjected to gross receipts taxes in several States. Thus, the resultant rate of tax paid by the interstate seller on each sale would be greater than that paid by a local seller. If both the State of origin and the State of delivery imposed a gross receipts tax of 2% on the seller, the interstate seller would pay gross receipts taxes at the rate of 4% on each sale, whereas the local seller would pay the identical tax at a rate of only 2%. The result would be the same as if the local State imposed a rate of 4% upon interstate sellers and 2% upon local sellers. Hence, there would be discrimination against interstate commerce. This, and nothing more than this, is what is meant by the rule against multiple taxation.

That is why we have insisted upon the importance of the distinction between a tax on a buyer and a tax on a seller. In the former type, the tax is localized to the

buyer's State and cannot, because of the due process clause, be imposed in any other State. But if it is imposed upon the seller, who is engaged in selling his wares in several States and whose activities are therefore ambulatory in character, the tax may be of such a nature that, if valid, it could be imposed with equal right by each of the States in which some part of the seller's business takes place.

Similarly, the importance of the distinction between a tax on the transfer of title and possession and a tax on gross receipts is that the transfer of title and possession is a local event which can take place in only a single State and, therefore, can be taxed in only a single State, whereas the gross receipts of one engaged in an interstate business might be taxed in every State in which his business is carried on. For, again, the negotiation and consummation of interstate sales is a business of an ambulatory nature which, if it can be taxed at all, can be taxed wherever it is found. A gross receipts tax is imposed upon the activity as a whole, which, not being confined to any one locality, cannot be localized.

Respondent concedes that, because of the due process clause, the particular tax at bar cannot be imposed in any other State (Resp. Br., pp. 26, 41-42). But counsel urge that multiple taxation not borne by local commerce may result also from the imposition in another State of wholly different taxes upon different taxpayers and upon different taxable events, provided only that the burden of the tax falls upon the same general transaction. In support of this proposition, counsel have conjured upon various other kinds of taxes which, they claim, might be imposed upon different events and upon a different taxpayer by other States, and which would, according to counsels' contention, subject the transactions of sale involved in the

case at bar to a multiple tax burden not borne by similar transactions where no interstate shipment is involved.

But it is our contention that the taxes suggested by counsel, or any other similar taxes that might be imagined, are either invalid in themselves, in that they result in multiple taxation without regard to the existence or non-existence of the tax at bar, or, if valid, that they are of such a nature that identical taxes might be imposed with equal right by the State of New York upon similar phases of similar transactions taking place wholly within that State.

If the tax is imposed upon an ambulatory phase of the transaction, concededly it can be imposed in more than one State; but in that event the Court would hold it unconstitutional, unless apportioned. If, on the other hand, the tax is not imposed upon an ambulatory phase of the transaction, it can be imposed only in the single State where the activity taxed takes place. In that event it is valid; but its burden, if any, exists independently of the tax at bar. Furthermore, in either event the burden of any such tax would be borne equally by local commerce: an apportioned tax on the local proportion of an ambulatory phase of the transaction would be matched by an unapportioned tax upon the same features of a wholly local transaction; and a tax upon a local phase of a transaction in another State would be matched by a tax on the same phase of a transaction local to the State of New York.

In other words, we contend that it is only when the tax is of such a nature that if valid in one State an identical tax upon the identical property or event could be imposed with equal right in another State that the danger of multiple taxation arises. To find the correct answer to these conflicting contentions seems to us to be the only issue left in the case.

POINT III.

The possible imposition by other States of different taxes upon different phases of the same transaction, or upon a different taxpayer, cannot affect the validity of the tax at bar.

As examples of the kinds of taxes which the respondent says might be imposed by the States of Pennsylvania and New Jersey in such a way as to impose tax burdens upon these transactions not borne by similar transactions of local origin, respondent cites the following: (1) a possible tax on delivery to a carrier for shipment imposed by the State of Pennsylvania; (2) a possible tax on "transshipment" imposed upon all transshipments from rail to water carrier by the State of New Jersey; (3) a possible gross receipts tax imposed by the State of Pennsylvania.

At the outset it must be noted that none of these taxes has been imposed upon the respondent or anyone else in connection with the transactions involved in this case. An obvious answer to respondent's claim that such taxes might subject it to a discriminatory burden would seem to be found in *Southern Pacific Co.* v. *Gallagher* (306 U. S. 167, 172 [1939]):

> "It will be time enough to resolve that argument 'when a taxpayer paying in the state of origin is compelled to pay again in the state of destination.'" (Citing *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 587 [1937].)

The difficulty in discussing hypothetical taxes is that, in the absence of a concrete factual situation, it is not even possible to determine in advance whether they would be valid. For example, a tax on transshipment or on the delivery to a carrier for shipment would probably fall

within that category of taxes mentioned in our general discussion at pages 29 to 40 of our principal brief as opening the door to selective discrimination against interstate commerce, because of the selection, as the object of tax, of one of the very instruments of transportation. Such selective taxes must always be scrutinized with great care, lest they be hidden attempts to discriminate.[1] And as to a gross receipts tax, the principal burden of respondent's brief is that such a tax upon a sell" in interstate commerce, if unapportioned, is void.

Because of this uncertainty as to the validity of the suggested taxes, we are not quite clear whether it is respondent's contention that these hypothetical taxes might be imposed by the States of Pennsylvania and New Jersey in any event, or whether it is counsels' contention that, if this Court should hold the tax in this case valid, a precedent would be established which would compel the Court in a later case to validate the other taxes referred to, when imposed on the same transactions by the other States. Let us first examine these imaginary taxes on the theory that they could be imposed by the States of Pennsylvania and New Jersey regardless of the determination of the Court in this case.

A. The burden of the imaginary taxes suggested by respondent, if they are valid in their own right, would exist independently of the tax at bar and would be equally borne by similar transactions of local origin.

Obviously, if a tax could be imposed in Pennsylvania on the delivery of this coal to the carrier for shipment, or in New Jersey upon its transshipment, or if the State

[1] A general sales tax, on the other hand, contains no such selective feature.

of Pennsylvania could in any event impose a gross receipts tax upon the business done by this respondent in that State, regardless of whether or not the present tax is held valid, then those same taxes could be imposed in those States even if there were no New York City Sales Tax Law at all. If there were no such law, respondent's coal would still be subjected to those burdens in the other States and would still reach New York subject to those taxes which, according to respondent, would not be borne by goods of local origin. In other words, the burden of those taxes exists independently of the tax here in issue. How then can the imposition of this sales tax increase the burden upon these goods in any greater proportion than it increases the burden upon sales of goods of local origin? Clearly, if the relationship between interstate and intrastate commerce remains unaffected by the imposition of the tax, it cannot violate the Commerce Clause.

Similarly, if these taxes could be imposed in any event, regardless of the decision of this Court in this case, then their burden would be as great if the taxes involved in this litigation had been imposed under a tax modeled upon the California use tax. Yet the respondent insists that it would be perfectly proper for the City of New York to compel it to collect the very money involved in this litigation from the very purchasers involved in this litigation on account of the very purchases of coal involved in this litigation, and pay it over to the City, if the statute were called a use tax (Resp. Br., pp. 52-58). Surely, if these imaginary taxes conjured up by our adversaries would impose a burden of multiple taxation and a restriction upon the free flow of interstate commerce when imposed in addition to the tax here involved under the title "sales tax", interstate commerce would not be freed from these restrictive burdens by merely changing the name from "sales" to "use" tax.

But we think the short answer to this whole contention is that these taxes, if valid at all, might with equal right be imposed upon all similar transactions of local origin by the State of New York. Obviously, a tax upon delivery to a carrier for shipment, if valid at all, can be imposed as well by the State of New York upon goods shipped from Buffalo or from Staten Island, as by the States of Pennsylvania or New Jersey upon the goods at bar; and if New Jersey can impose a tax upon transshipment, so again can the State of New York upon any transshipment occurring within the State. Clearly, therefore, so far as these taxes are concerned the burden of multiple taxation, if any, is one to which local commerce may be equally subjected.

So also, as to an apportioned gross receipts tax imposed upon the respondent by the State of Pennsylvania, or even by the State of New Jersey: a similar gross receipts tax could be, and in fact is, imposed by the State of New York upon all local vendors. Accordingly, the multiple burden, if any, is borne equally by local commerce, and the transaction here involved would be no worse off than transactions involving sales of goods produced within the State.

But at pages 51 to 52 of their brief, counsel for respondent present an argument which, as far as we can make out, is based upon the proposition that the States of New Jersey and Pennsylvania could impose an *unapportioned* gross receipts tax upon this respondent on account of the very transactions involved in this case.

We quite agree that the imposition of such unapportioned gross receipts taxes upon this respondent in the States of Pennsylvania and New Jersey, particularly when added to a gross receipts tax imposed upon the respondent under the New York gross business tax, would subject

these transactions to a burden of multiple taxation not borne by local commerce. *That is just why this Court has held, in both the Adams and Gwin, White cases that such a tax would be unconstitutional.* Moreover, the cumulative tax burden resulting from the imposition of such a tax would not be caused by the tax at bar. It would exist whether or not the tax at bar were sustained, and whether or not there were any such tax as the tax at bar imposed within the City of New York at all. It would exist also if the sums of money involved in this case had been assessed under a use tax. Obviously, therefore, the danger of the imposition of such a tax, if such danger exists, cannot affect the validity of the tax at bar; for its danger is no greater whether that tax is imposed or not.

B. If the imaginary taxes suggested by respondent are not valid in their own right, a decision sustaining the tax at bar would not open the door to their imposition.

We cannot understand by what process of reasoning respondent reaches the conclusion that the States of Pennsylvania and New Jersey could impose unapportioned gross receipts taxes. Seven times in the three pages of their brief discussing this proposition, they refer to the *Gwin, White* case (Resp. Br., pp. 50-52). The only thing established by that case is that an unapportioned gross receipts tax upon one who sells goods in interstate commerce is unconstitutional.

At page 56 of their brief counsel say that if the Court sustains the tax at bar, it would "open the door" to the imposition of multiple taxes on the same transactions in other States. We assume, therefore, that the argument must be that if the Court should sustain the present tax, a precedent would be established which would be binding in subsequently passing upon an unapportioned

gross receipts tax imposed upon this seller by the State of Pennsylvania. If the present tax be sustained, then, we assume upon the basis of *stare decisis*, respondent contends that the Court will have to sustain a gross receipts tax imposed upon this respondent on account of these same transactions by the State of Pennsylvania. And presumably it is respondent's further contention that upon some similar theory, if the Court sustains the tax at bar it would have to sustain the other imaginary forms of taxation suggested by counsel.

But nothing is more fundamental than that a decision of the Court upholding one tax cannot create a precedent, or "open the door", for another tax unless the two taxes are identical in every respect. What identity in fact, in theory or in law is there between the tax involved in this case and an unapportioned gross receipts tax imposed by the State of Pennsylvania upon this respondent, or a tax upon delivery to a carrier in Pennsylvania, or a transshipping tax in New Jersey? How can it be seriously argued that if the present tax be held valid, then this Court in following the precedent thus established in this case, would have to uphold these other taxes?

We note that our adversaries cite no cases in support of any such proposition. We think the reason is obvious. Such cases as relate to the subject at all clearly sustain the proposition that a tax may be imposed upon any phase of an interstate transaction which is inseparably related to a local event, even though other taxes, upon the same transaction but not related to a local event, have been held invalid. There is no rule that, if a tax upon one phase of an interstate transaction is upheld, taxes upon any other phases occurring in other States must also be upheld. This Court has repeatedly drawn distinctions between a tax imposed upon an ambulatory phase of

an interstate transaction, which, unless apportioned, would subject interstate commerce to a danger of multiple taxation, and a tax upon some local phase, where, because the identical tax could not be imposed in any other State, it has been sustained (*East Ohio Gas Co.* v. *Tax Comm.*, 283 U. S. 461 [1931]; *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165 [1932]; *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604 [1938]). Certainly, the physical relationship between the transfer of title and possession of personal property and the interstate transaction is no closer than the physical relationship between the "taxable moment" found sufficient to sustain the tax in each of the cases just cited and the interstate commerce of which it was an "integral part".

It is apparent from a consideration of these cases that there is no substance whatever to the respondent's argument that the rule of multiple taxation presents a bar to the imposition of different taxes upon different phases of an "integrated transaction." It is only when a tax imposed upon some activity related to an interstate transaction is *not* tied down to some local event which can take place in only a single State, or to a local taxpayer who can be in only a single State, that the tax is of such a nature that, if allowed at all, it could be imposed with equal right by another State. That is the rule of multiple taxation, and it has no application whatever to the tax at bar.

POINT IV.

The respondent's contention concerning the New York City personal property tax and the possible adoption of a use tax, has no bearing upon the validity of the tax at bar.

Respondent sets forth the New York City personal property tax statute (Appendix B, Resp. Br.) and argues that the tax at bar should not be sustained because transactions of the type here involved may be taxed under the personal property tax law or, if the form of that statute is inadequate, by the adoption of a use tax modeled after the California statute (Resp. Br., pp. 55-58).

We know of no principle of constitutional law which requires this Court to invalidate a State taxing measure because the same result can be accomplished by an alternative legislative method validated in an earlier decision. Indeed, the very statement of such a proposition indicates that the statute under attack is open to no constitutional infirmity, for it tacitly concedes that the effect of the assessment at bar is not to impose a burden of taxation prohibited by the Commerce Clause. This Court has sedulously followed the salutary principle that it is the function of State legislative bodies alone, and not of this Court, to decide upon the proper methods of achieving legislative aims. So long as the assessment here sought to be imposed may concededly be collected under a statute named a "use" tax, it is obviously not within the province of this Court to decide that it cannot be collected because the City Council has termed it a "sales" tax. Certainly, this respondent would be no happier if the $176,703,89 involved in this litigation were assessed against

it under a use tax. The existence of the personal property tax law has no bearing on the validity of the assessment at bar.

Moreover, this contention conveniently overlooks the important fact that there are millions of dollars of taxes collected and assessments outstanding for the periods covered by the existing statutes which would be nullified. Indeed, if the tax at bar in the sum of $176,703.89 for the period December 10, 1934 to December 31, 1935, is representative of the respondent's business, the total liability of the respondent at bar alone for taxes collectible from its purchasers to date is nearly $1,000,000.

If the City of New York were to adopt the California system, sharp changes in the sales and personal property taxes and their administration would be necessitated, but there would be no change whatever in the burden of taxation affecting sales of goods shipped across State lines. The personal property tax law was designed primarily to cover New York City consumers who go outside the City to make their purchases, taking delivery there and thereupon bringing the merchandise into the City. The sales tax law was designed to tax all purchases in which delivery is made in the City, whether or not across State lines. This is of course reflected in the remittitur in the case at bar, which by resting the decision solely on federal grounds, affirms our contention that, so far as the local law is concerned, the transactions were intended to be taxed under the sales tax law.[1]

[1] In some instances, assessment may be made as to the same transactions under both laws, the personal property tax assessment acquiring validity only if the sales tax assessment fails.

The advantages of taxing purchases involving shipment across State lines under the sales rather than the personal property tax law are obvious. Collection from the purchaser is provided for only under the sales tax law (Appendix A, Appendix of Statutes, Sec. 2). Under the personal property tax law the owner files returns and pays the tax directly (Local Law No. 25 of 1934, Sec. 1, Resp. Br., p. 65, Appendix B). Because of the difficulties of maintaining administrative check or control over vast numbers of purchasers, the personal property tax is limited in coverage to articles of considerable bulk and value; there is an exemption for annual purchases not exceeding $100.[1]

Counsels' contention that New York City should be required by this Court to tax interstate sales under an amended personal property tax or a use tax law would serve only to disrupt the New York City system of taxation, without in the least altering the burden or effect of the tax on interstate commerce. So long as the tax at bar does not subject interstate commerce to a greater burden, or to the danger of a greater burden, of taxation than that borne by local commerce, it is valid whether called a "sales" tax or a "use" tax.

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[1]There are other differences between the two statutes. The penalties under the personal property tax law are much higher than under the sales tax law (Sec. 15, sales tax law; Sec. 12, personal property tax law). The methods of review and contesting assessments differ under the two statutes (Secs. 7 and 9, sales tax law; Sec. 8, personal property tax law).

POINT V.

By amending the remittitur, the Court of Appeals disposed of any contention that certain of the transactions at bar were not taxable under the State enabling act.

Respondent argues that as to certain of the sales involved in this litigation, the delivery was in fact made outside the State, and that therefore the attempt to assess the tax violates the provisions of the enabling act (Resp. Br., pp. 9, 18).

The contract of the respondent with Austin, Nichols Company called for delivery "f.o.b. Deld. Mine" (Ex. 25, R. 139), and the contract with the New England Steamship Company called for delivery "f.o.b. cars Harsimus Pier, Jersey City, New Jersey" (Ex. 21, R. 130). It was the respondent's contention in the State courts that these delivery terms resulted in the passage of title and possession outside of New York City and that the sales were thus outside the scope of the State enabling act (Br., Point II, pp. 27-28). The petitioner's position was that these terms were price-fixing in nature, serving merely to fix the liability for freight charges, and that the taxpayer had not proved that they had any other significance (*Cf.* treatment by this Court in *Wiloil Corporation* v. *Pennsylvania*, 294 U. S. 169 [1935] of the term "f.o.b. Wilmington.") (Br., Point III, pp. 13-14).

In opposing the petitioner's motion to amend the remittitur in the Court of Appeals, the respondent in its brief particularly urged upon the Court that the assessment on the sales to these two companies was illegal under State law. It requested the Court to rule that "a non-

federal question of local state law also is presented as to the sales to two of the twenty purchasers" (Memorandum in Answer to Defendant-Appellant's Motion to Amend the Remittitur, p. 2). The Court of Appeals ruled against the taxpayer and provided in the remittitur that its judgment of affirmance was based "upon the sole ground that the City Tax Law, as here applied violates the Commerce Clause (Art. 1, sec. 8, Cl. 3) of the Constitution of the United States" (R. 158; 281 N. Y. mem. 94, 22 N. E. (2d) 764 [1939]).

We are aware that when an appellant comes before this Court asserting that a federal right has been denied him, the certificate of the State court that the federal question, *inter alia*, was passed upon, has no power to cure a patently defective record. But, where the federal right has been upheld against the contention that it did not exist, the Court's certificate that in effect it deemed all State questions too clear to require expression and so placed its decision on federal questions alone, ought to be conclusive.

Conclusion.

There is no dispute as to the right of the City, under the Constitution, to compel this respondent to collect the $176,703.89 here involved from the same purchasers on account of the same coal upon the sales of which the tax at bar was assessed.

The only dispute is whether this sum can be collected under a sales tax, or only under a use tax.

That there is neither reality nor substance to such a distinction is apparent from an examination of the arguments advanced to sustain it. For every "burden" which respondent suggests might result from the tax at bar, exists, if it exists at all, with equal force under a use tax.

The final order and judgment should be reversed and petitioner's determination confirmed.

January 2, 1940.

Respectfully submitted,

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